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COMPANY

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

DALE EVANS PARKWAY 2012, LLC

Plaintiff,

vs.

NATIONAL FIRE & MARINE
INSURANCE COMPANY, a
Corporation; and DOES 1-20, inclusive,

Defendant.

CASE No. 5:15-cv-00979-JGB-SP

[Assigned to Courtroom 1, Judge Jesus
G. Bernal; Referred to Magistrate Judge
Sheri Pym for Discovery Matters]

**DEFENDANT NATIONAL FIRE &
MARINE INSURANCE
COMPANY'S OPPOSITION TO
PLAINTIFF DALE EVANS
PARKWAY 2012, LLC'S MOTION
TO QUASH SUBPOENA;
DECLARATION OF STEVEN T.
ADAMS**

Date: October 25, 2016
Time: 10:00 a.m.
Crtrm: 3 or 4, Third Floor

*[Filed Concurrently with Declaration of
Steven T. Adams]*

AND RELATED CROSS-ACTION(S).

Trial Date: March 14, 2017

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1 **I. INTRODUCTION**

2 Dale Evans Parkway 2012, LLC (“Plaintiff”) is suing National Fire & Marine
 3 Insurance Company (“National Fire”) for insurance coverage for a theft loss
 4 occurring in April 2014, at Plaintiff’s property located at 15000 Dale Evans
 5 Parkway, Apply Valley, California (the “Property”). National Fire paid the
 6 vandalism portion of the claim (made at the same time as the theft claim) in full
 7 (\$200,000) but denied the theft portion of the claim on grounds Plaintiff had not
 8 complied with the insurance policy’s “Protective Safeguards Endorsement,” which
 9 required Plaintiff to maintain a functioning burglary alarm system at the site.
 10 Plaintiff concedes this is true—it did not maintain a functioning burglary alarm
 11 system at the site—but contends this express policy condition should be ignored
 12 because it was “impossible” for Plaintiff to comply. National Fire disagrees.¹

13 The subject document subpoena to Plaintiff’s lender, the Banc of California
 14 (“the Bank”), relates to Plaintiff’s “impossibility” claim, which Plaintiff has defined
 15 differently at different times. First, Plaintiff took the position it was impossible to
 16 activate and maintain the existing burglar alarm system before the April 2014 loss,
 17 because to do so would have required a complete restoration of the Property’s
 18 electrical system, which could not have been done in less than nine months, at a cost
 19 of not less than \$500,000.² Second, Plaintiff explained (as it does in its present
 20 motion)³ the maintenance of a functioning burglary alarm system was impossible
 21 because the funds needed to do so—which had been paid by Plaintiff’s prior insurer

22 ¹ Plaintiff’s “impossibility” claim has prompted serious questions about the
 23 information Plaintiff provided to National Fire as part of its application for
 24 insurance, including information concerning the condition of the Property and
 25 Plaintiff’s specific representation the Property was “alarmed” with a Tyco
 Integrated Security system. In fact, Plaintiff’s misrepresentations regarding
 the alarm system and its failure to provide complete loss information has led
 to National Fire’s assertion of a rescission claim against Plaintiff.

26 ² Plaintiff’s Opposition to National Fire’s Motion for Summary Judgment;
 27 Declaration of Craig Fostrey, ¶ 9; Adams Declaration, ¶ 7.

28 ³ Plaintiff’s present Motion to Quash, at p. 4:15-17.

(CIG)—were not available because the Bank used the funds to pay down Plaintiff's loan on the Property instead of using the funds for restoring the Property's electrical system. (The inference being Plaintiff was not financially capable, without the CIG insurance money, to make the necessary repairs to the Property.)⁴ Third, Plaintiff has claimed the maintenance of a functioning alarm system was "impossible" because such a system would not effectively secure the building.⁵

National Fire's subpoena to the Bank therefore sought the production of documents relating to the various iterations of Plaintiff's "impossibility" claims, including:

- The true condition of the Property (Categories 8-14)
- The CIG funds, including the decision made by Plaintiff and the Bank to use the funds to pay down Plaintiff's loan, as opposed to making the repairs to the Property for which they were earmarked (Categories 8-14)
- Plaintiff's financial capacity to make necessary repairs to the Property's electrical system, and thus activate the building's alarm system (Categories 5-7, and 9-13)
- Insurance claims, the National Fire policy and other coverage (Categories 8-15)
- Insurance requirements placed upon Plaintiff by the Bank (in the loan documents or otherwise) (Categories 1-4, and 15)
- Communications among the Bank, Plaintiff⁶ and The Mahoney Group regarding any of the above

As a result, each category of subpoenaed documents sought materials relevant to issues raised by Plaintiff, and were sufficiently tailored to permit the Bank to identify and produce the documents in its possession. For these and other reasons

⁴ The disposition of the CIG funds was also entirely within Plaintiff's control despite Plaintiff's suggestion to the contrary. In fact, the Bank would not use the funds to pay down the balance of Plaintiff's loan until it received a written request from Plaintiff to do so. Frances Fernandez-Bir deposition, at pp. 27:25 – 28:6; Joseph Michael deposition, at pp. 113:7 – 114:25; Adams Decl., ¶¶ 5-6.

⁵ Deposition of Joseph Michael, pp. 116-119; Adams Decl., ¶ 5.

⁶ Including Mr. Michael, Plaintiff's "sole managing member," and his development company. Plaintiff's Motion, at 3:17.

1 set forth below, Plaintiff's motion is without merit and should be denied.

2 **II. DISCUSSION**

3 **A. Legal Standard**

4 The threshold for discoverability under the Federal Rules of Civil Procedure
 5 ("FRCP") is broad, and considers whether the information sought is "relevant to any
 6 party's claim or defense and proportional to the needs of the case ..." FRCP 26(b)(1).
 7 The information within FRCP 26's scope "need not be admissible in evidence to be
 8 discoverable." *Id.* The relevance standard under the FRCP is therefore broad
 9 enough "to encompass any matter that bears on, or that reasonably could lead to
 10 other matter that could bear on, any issue that is or may be in the case."
 11 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (citation omitted).
 12 Accordingly, the Court has broad discretion to determine relevancy for discovery
 13 purposes. See *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir.2002).

14 Under FRCP 45, any party may serve a subpoena commanding a non-party to
 15 attend and give testimony or to produce and permit inspection and copying of
 16 documents. FRCP 45(a)(1)(B) - (D). The party moving to quash a subpoena has the
 17 burden of persuasion under Rule 45(e)(2). See also *Moon v. SCP Pool Corp.*, 232
 18 F.R.D. 633, 637 (C.D.Cal.2005). Plaintiff, however, has made no attempt to meet
 19 this burden but has instead attempted to shift its burden to National Fire. The
 20 present motion should be denied on this ground alone.

21 **B. The Subpoenaed Records Are Highly Relevant**

22 As discussed above, Plaintiff's recurring argument has been that it was
 23 "impossible" to comply with the Protective Safeguards Endorsement of the Policy
 24 because it was unable to repair the Property's electrical system and, consequently,
 25 could not power the burglary alarm system. (Declaration of Joseph Michael in
 26 Support of Plaintiff's Opposition to National Fire's Motion for Summary Judgment
 27 ("Michael Decl."), ¶ 15, pg. 6: 1-12; Adams Decl., ¶ 4.) In the present motion,
 28 Plaintiff again points the finger at the Bank, claiming it was

1 [U]nable to perform repairs [to the Property's electrical
 2 system] in part due to the fact that the insurance proceeds
 3 from CIG went to pay down the loan rather than to
 4 Plaintiff for use in repairing the electrical system at the
 property. Thus Plaintiff was unable to satisfy the
 "Protective Safeguards Endorsement" as its performance
 was impossible. [Motion to Quash, 4:15-19].

5 National Fire is therefore entitled to discovery to respond to Plaintiff's
 6 allegations and to counter its arguments, including the claim that it was "impossible"
 7 to comply with the Protective Safeguards Endorsement. Plaintiff's relationship with
 8 the Bank and all of the factors bearing upon the decision to use the CIG insurance
 9 money to pay down the Bank's loan on the Property instead of making repairs
 10 (including all of the information provided to the bank bearing on that decision),
 11 make the subpoenaed documents discoverable, if not directly relevant.⁷

12 For example, Plaintiff has repeatedly mentioned that the Bank thought it more
 13 prudent to use the insurance proceeds for purposes other than repair: "[The Bank]
 14 did not believe repairing the electrical system at the time was prudent given the
 15 vacancy of the Property and frequency of the vandalism." (Plaintiff's Motion, pg.
 16 3:20-24.) (See also Michael Decl., ¶ 13, pg. 5: 10-14; Adams Decl., ¶ 4.) However,
 17 to the extent this is true, it appears the Bank was not properly advised of the effect
 18 putting off repairs would have on the National Fire insurance coverage. When the
 19 Bank was deposed, its representative, Ms. Fernandez-Bir, testified the Bank expects
 20 its borrowers to comply with insurance policy conditions to keep the insurance in
 21 effect and to protect the Bank's collateral. (Fernandez-Bir Deposition, at 33:19 –
 22 24; Adams Decl. ¶ 6) She added the Bank expects its borrowers to tell it if the
 23 insurance—designed to protect the collateral—is no longer potentially in effect
 24 because the borrower has not met one of the conditions of the insurance policy.

25
 26 ⁷ Plaintiff provides no factual or legal support to support the narrow view that
 27 the "sole relevant transaction" for National Fire's discovery is the disposition
 28 of CIG funds (\$503,987.00), including the reasons the Bank used them to pay
 down the balance of Plaintiff's loan instead of using them to make repairs to
 the Property. (Motion, at 4:26.)

(Fernandez-Bir Deposition, at 33:25 – 34:4; Adams Decl. ¶ 6) All information provided to the Bank concerning the condition of the Property, insurance coverage for the Property, including the need to make repairs at the Property to keep insurance coverage in effect, is discoverable and necessary to enable National Fire to properly prepare its defense for trial.

Likewise, information received by the Bank from Plaintiff, The Mahoney Group or others, concerning Plaintiff's claims to CIG, the CIG payment of claims, and the National Fire policy, are all discoverable for the same reasons. Also, communications, memoranda, and other records in the Bank's possession pertaining to the Property and Plaintiff are vital and relevant to understanding and countering Plaintiff's claim of coverage despite admittedly failing to comply with express policy conditions. The requested loan agreement is also discoverable because it defines the mutual obligations of Plaintiff and the Bank relating to the Property, particularly with respect to required insurance for the Property.

Moreover, since Plaintiff has made its relationship with the Bank and its financial capacity to make repairs to the Property issues in this matter, National Fire is entitled to conduct discovery concerning both. Nevertheless, the subpoena does not seek information or documents unrelated to the Property, nor does it seek information concerning any of Mr. Michael's other business dealings or financial transactions with the Bank. National Fire is, therefore, entitled to discovery to allow it to fully respond to Plaintiff's claims.

**C. Plaintiff's Claim of Privilege and Privacy Do Not Prevent
Production of the Subpoenaed Records**

Plaintiff's claims of privilege and the right of financial privacy are qualified; they are not absolute. See *Anderson v. Abercrombie and Fitch Stores, Inc.* (S.D. Cal., July 2, 2007, No. 06CV991-WQH (BLM)) 2007 WL 1994059, at *6. FRCP 45(d)(3)(A)(iii) requires a court to quash or modify a subpoena only where the subpoena compels disclosure of a privileged or protected matter. The person

1 claiming the privilege, however, must: "i) expressly make the claim; and (ii)
 2 describe the nature of the withheld documents, communications, or tangible things
 3 in a manner that, without revealing information itself privileged or protected, will
 4 enable the parties to assess the claim." FRCP 45(e)(2)(A)(i)-(ii). Plaintiff has not
 5 done so.

6 Federal Rule of Evidence ("FRE") 501 "provides the framework for
 7 determining whether material sought in discovery is privileged." *Mem'l Hosp. for*
 8 *McHenry Cnty. v. Shadur*, 664 F.2d 1058, 1061 (7th Cir.1981). FRE 501 states that
 9 "in a civil case, state law governs privilege regarding a claim or defense for which
 10 state law supplies the rule of decision."

11 Under California law, "confidential financial information given to a bank by
 12 its customers is protected by the right to privacy" under the California Constitution.
 13 *Fortunato v. Super. Ct.*, 114 Cal.App.4th 475, 480 (2003) (quoting *Valley Bank of*
 14 *Nev. v. Super. Ct.*, 15 Cal.3d 652, 656 (1975).) A balancing test is applied for
 15 considering the competing interests of protecting financial privacy to the
 16 subpoenaing party's right to discovery. A court may allow discovery of private
 17 financial records from a bank after "carefully balanc[ing] 'the right of civil litigants
 18 to discover relevant facts, on the one hand, with the right of bank customers to
 19 maintain reasonable privacy regarding their financial affairs, on the other.'" *Id.* at
 20 481. Financial privacy extends to confidential information, including "tax returns,
 21 checks, statements, or other account information." *Id.* Relevant factors when
 22 applying the balancing test include: "[1] the purpose of the information sought, [2]
 23 the effect that disclosure will have on the parties and on the trial, [3] the nature of
 24 the objections urged by the party resisting disclosure, and [4] ability of the court to
 25 make an alternative order which may grant partial disclosure, disclosure in another
 26 form, or disclosure only in the event that the party seeking the information
 27 undertakes certain specified burdens which appear just under the circumstances."
 28 *Id.* (quoting *Valley Bank of Nev.*, 15 Cal.3d at 658).

1 Purpose of the Information Sought: The information sought by the subpoena
 2 is for the purpose of evaluating and challenging Plaintiff's recurring claim it was
 3 "impossible" for it to comply with the Protective Safeguards Endorsement in the
 4 National Fire policy because, for various reasons, the Property's electrical system
 5 could not be repaired. Communications, memoranda, agreements, etc. are all
 6 pertinent to this issue, and are discoverable. They are not the type of documents
 7 intended to be protected under California's Constitutional privacy standard.
 8 Additionally, the insurance documents sought, including loan agreements defining
 9 the bank's insurance requirements for the Property—and any communications
 10 relating to them—are not within the protected class, and are directly relevant to the
 11 issues to be decided at trial.

12 Effect that Disclosure will have on the Parties: The Bank's disclosure of the
 13 subpoenaed documents will assist National Fire in addressing Plaintiff's claims and
 14 will not prejudice Plaintiff. Plaintiff has raised issues in the litigation that have
 15 made these documents relevant. Also, the requested items, including the Bank's
 16 communications with non-parties, such as the Mahoney Group, regarding the
 17 Property and related insurance are relevant and do not include even potentially
 18 private financial information of Plaintiff.

19 Nature of the Objections Urged by the Plaintiff: Plaintiff's claims of privilege
 20 and financial privacy are extremely vague, non-specific, and without supporting
 21 authority.⁸ Plaintiff has not provided a privilege log indicating which records it
 22 deems protected. Plaintiff "has not articulated how the disclosure will harm [it or
 23 Joseph Michael individually] beyond a general intrusion into ... privacy." *R.*
 24 *Prasad Industries v. Flat Irons Environmental Solutions Corp.* (D. Ariz., June 20,

25 ⁸ Plaintiff's reference to Joseph Michael as a non-party is misleading (Motion,
 26 at 4:24). Mr. Michael is the "sole managing member" of Plaintiff (Motion, at
 27 3:17). He is the sole owner of Plaintiff and if one communicates with
 28 Plaintiff, he or she is communicating with Mr. Michael. Mr. Michael also
 refers to himself in the "first person" as the Plaintiff. (Michael Declaration, ¶
 2; Adams Declaration, ¶4.)

2014, No. CV-12-08261-PCT-JAT) 2014 WL 2804276, at *5. "While [Plaintiff's] privacy interest alone does have value, because [it] did not outline more specific harms that [it] would suffer as a result of disclosure of [its] banking records, [the third] factor [above] does not weigh as heavily in favor of nondisclosure as it otherwise might have." *Id.* at *6. Additionally, Plaintiff has cited no supporting authority for its privilege and privacy claims, especially the extent to which Plaintiff, a Limited Liability Company, has privacy rights.

Plaintiff's claim that the subpoena is overly broad is likewise unfounded, and similar to the position advanced by the party seeking to quash a subpoena in *R. Prasad Industries v. Flat Irons Environmental Solutions Corp.* There, the moving party objected to the disclosure of all transactions in her bank account, rather than limiting disclosure to records confirming receipt of a particular wire transfer. The Court there denied the motion, finding that the subpoenaing party articulated reasons why the bank information was relevant, as the bank transactions could show defendants acted in good faith in attempting to make a purchase. *Id.* at *5.

Ability of the Court to Make an Alternative Order: Lastly, National Fire has offered and is amenable to entering into a protective order, agreeing to only use the records provided by the Bank in the context of this litigation and to promptly return them upon final resolution of the instant matter.

National Fire is therefore entitled to the documents sought by the subpoena and an order accepting the Bank's disclosure is warranted after a weighing of the competing interests of the parties.

D. Due to Plaintiff's Failure to Serve Banc of California with the Present Motion, the Bank Has Already Produced the Subpoenaed Documents to National Fire

On September 29, 2016, Banc of California delivered to the offices of National Fire's counsel, the Declaration of Frances Fernandez-Bir, along with a CD containing the documents it deemed responsive to the subpoena, except "to the

1 extent that any records [produced] do not contain confidential or proprietary
2 information of the Bank.”⁹

3 Tammy Nguyen, a representative of the bank, later indicated to National
4 Fire’s counsel that the Bank’s documents were produced to National Fire because
5 the Bank did not receive a motion to quash from Plaintiff.

6 As a result of Plaintiff’s failure to serve the Bank with the present motion,
7 Plaintiff’s motion is now moot.

8 **III. CONCLUSION**

9 The documents sought by the National Fire subpoena are directly relevant to
10 issues raised by Plaintiff in this action and are within the proper scope of discovery
11 under the FRCP. Additionally, Plaintiff’s claims of privilege and privacy are vague
12 and unfounded, and otherwise fail when balanced against National Fire’s need for
13 the information contained in the subpoenaed documents. Finally, the present motion
14 is moot, as the Banc of California has already produced the subpoenaed documents
15 to National Fire. National Fire, therefore, respectfully requests that Plaintiff’s
16 Motion be denied.

17
18 DATED: October 11, 2016

MUSICK, PEELER & GARRETT LLP

19
20
21 By: /s/ Steven T. Adams

22 Steven T. Adams
23 Attorneys for Defendant NATIONAL
24 FIRE & MARINE INSURANCE
25 COMPANY
26

27 ⁹ Declaration of Frances Fernandez-Bir, attached as Exhibit 1, to the
28 accompanying Declaration of Steven T. Adams.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is One Wilshire Boulevard, Suite 2000, Los Angeles, CA 90017-3383.

On October 11, 2016, I served true copies of the following document(s) described as **DEFENDANT NATIONAL FIRE & MARINE INSURANCE COMPANY'S OPPOSITION TO PLAINTIFF DALE EVANS PARKWAY 2012, LLC'S MOTION TO QUASH SUBPOENA; DECLARATION OF STEVEN T. ADAMS** on the interested parties in this action as follows:

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☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Musick, Peeler & Garrett LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is

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7 I declare under penalty of perjury under the laws of the State of California
 that the foregoing is true and correct.

8 Executed on October 11, 2016, at Los Angeles, California.

9
 10 /s/ Claire C. De Los Reyes
 11 Claire C. De Los Reyes